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IN THE

Supreme Court of the United States

October TERM 1983

No. _____

RAYFORD C. PACE,
Petitioner,

v.

SOUTHERN RAILWAY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RAYFORD C. PACE, Pro Se

2101 Plantation Lane
Chamblee, Georgia 30341

August 30, 1983

QUESTIONS PRESENTED

Did the United States Court of Appeals for the Eleventh Circuit depart from the accepted course of Judicial proceedings as to call for an exercise of the United States Supreme Court Supervision.

Question Presented: May a United States Court of Appeals arbitrarily exclude evidence that was clearly presented to that Court, and as a result, permit an adverse ruling on the party affected.

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The Petitioner, RAYFORD C. PACE, respectfully prays that a writ of certiorari issue to review the Judgement of the United States Court of Appeals for the Eleventh Circuit entered in this proceedings on April 4, 1983.

OPINION BELOW

The opinion of the United States Court of Appeals, rendered April 4, 1983, appears in Appendix "A" attached hereto.

JURISDICTION

The Judgement of the Court of Appeals for the Eleventh Circuit was entered April 4, 1983. A timely petition for rehearing was denied on June 2, 1983, and this Petition for Certiorari was filed within 90 days from that date. The Court's jurisdiction is invoked under 28 U.S.C. § 1291.

STATEMENT OF THE CASE

Petitioner Submits that the lower Courts erred as a matter of law and judgement when,

1. *Granting Defendant's Motion for Summary Judgement when there were germane material facts and factual inferences in dispute and,*

2. *By ruling that Plaintiff did not make out a prima facie case of age discrimination because his immediate replacement was not outside the protected age group and,*

3. *By ruling that Plaintiff did not establish that he was qualified and consequently failed to make out a prima facie case of age discrimination.*

STATEMENT OF FACTS

On November 16, 1978, Defendant Southern Railway Company Simultaneously made the following personnel changes.

1. *Demoted Plaintiff from the position of Assistant General Superintendent Operations, C & S, a*

job rated 839 points, to the position of Senior Development Engineer, C & S, a job rated 617 points. Then, Plaintiff was 51 years old and had served the Defendant for more than 30 years. Plaintiff had served for more than 4 years in the position of Assistant General Superintendent, C & S.

2. *Assigned J. W. Smith to the position of Superintendent, C & S, Southwest District, a job rated 732 points. Then, Smith was 35 years old and had only 10 years service with the Defendant.*

3. *Assigned A. L. White to the position of Assistant Director of Engineering, C & S, a job rated 775 points. Then, White was 45 years old and had only 8 years service with the Defendant.*

4. *Assigned D. E. Barker to the position of Assistant General Superintendent operations, C & S. Then Barker was 49 years old and had only 22 years service with the Defendant.*

Defendant Southern Railway, in the process of demoting Plaintiff, deviated substantially from its normal procedure for making personnel changes. The normal procedure is for an employee's immediate supervisor to originate a form for a change in the employee's job status. In this case, F. H. McIntyre, Plaintiff's immediate Supervisor, testified that he did not originate the form for demoting Plaintiff, and furthermore, did not even see the form until November, 1978, this being after Plaintiff had been officially demoted. The form for

Plaintiff's demotion was originated by J. T. Hudson, Assistant Vice President, C & S.

Defendant failed to make annual performance appraisals each year for Plaintiff as required by Defendant's outstanding instructions. Plaintiff had received only one such appraisal, that in 1976, two years before Plaintiff was demoted.

There are no documented records of any systematic criticism of Plaintiff's performance, nor any written notes or records showing that the Plaintiff was ever counseled about his performance.

There are substantial conflicts between the deposed statements of Defendant's witness Hudson and witness McIntyre, and between the statements of these witnesses and the deposed statements of the Plaintiff.

ARGUMENT

The selection of an employee who is outside the protected age group in preference to a more qualified employee who is within the protected age group to fill a vacant position is perfect prima facie evidence of age discrimination. **Age Discrimination in Employment Act of 1967, Sec. 4 (a)(1).**

The selection of J. W. Smith in preference to the Plaintiff to fill the vacant position of Superintendent, C & S, Southwest District is perfect prima facie evidence of age discrimination. Plaintiff served for three years in the position of District Engineer, S & E, Southwest District, from 1968 to 1971, at which time Plaintiff was pro-

moted by the Defendant to the position of Superintendent, S & E, Southern Railway System. The position designation of District Engineer, S & E, Southwest District, was changed to Superintendent, C & S, Southwest District in 1971. Serving three years in a position, then being promoted from that position establishes perfect prima facie evidence of qualification for that position. Then, J. W. Smith was outside the protected age group.

The selection of A. L. White to fill the vacant position of Assistant Director of Engineering, C & S, in preference to Plaintiff clearly indicates age discrimination. Plaintiff had two years experience serving in the position of Office Engineer, S & E, a position comparable to the position of Director of Engineering, C & S. White had no such experience. This clearly indicates that Plaintiff was more qualified for this position than White.

The selection of D. E. Barker to fill the position of Assistant General Superintendent Operations, C & S, in preference to Plaintiff also clearly indicates age discrimination. Plaintiff had substantially more experience than Barker and had served for more than four years in this position.

In October, 1974, Defendant's Personnel Department evaluated Plaintiff and concluded that Plaintiff should be considered a good candidate for future promotional opportunities. Prima facie evidence of Plaintiff's qualifications abound.

The factual disputes and irregular procedure in effectuating the demotion of the Plaintiff raise substantial

questions as to the credibility of the Defendant's witnesses as well as questions about the motives of the people involved. These are vitally important issues, that in the interest of law and justice, warrent exploration for a jury decision in this case under applicable laws and regulations.

REASON FOR GRANTING WRIT

Supreme Court Supervisory intervention is required in this case to secure Plaintiff's right to a trial by Jury as decreed by the United States Supreme Court in *Lorillard u. Pons 434 U.S. 575*, and as provided for in 29 U.S.C. 626 (c)(2).

In this case, the lower courts have excluded evidence which substantially affects the rights of the Plaintiff, evidence which was made known to the lower court. This is incongruous with Rule 103 (a)(2) of the Federal Rules of Evidence.

CERTIFICATE OF SERVICE

I, Rayford C. Pace, do hereby certify that I have this day served counsel for the opposing party in the foregoing matter with a copy of this petition for Writ of Certiorari to the Supreme Court of the United States by depositing in the United States mail a copy of same in a properly addressed envelope with adequate postage theron.

This 30th day of August, 1983.

Rayford C Pace

RAYFORD C. PACE

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

RAYFORD C. PACE, Plaintiff	:	CIVIL ACTION
vs.	:	
SOUTHERN RAILWAY SYSTEM, Defendent	:	FILE NO. C79-1403A

ORDER OF COURT

This is an action for relief under the Age Discrimination and Employment Act of 1967, 29 U.S.C. §§621 *et seq.* ("ADEA"). Plaintiff Rayford C. Pace ("Pace") alleges that his employer Southern Railway Company ("Southern") discriminated against him on the basis of his age in connection with his demotion in November of 1978. Plaintiff contends that Southern's action violated the ADEA, and seeks declaratory relief, reinstatement to his former position, back pay, liquidated damages, punitive damages, costs and attorney's fees. This matter is currently before the court on Southern's motion for summary judgment.

Pace, 51 years old at the time of the demotion, was first employed by Southern in 1944. Except for two relatively brief interruptions – from 1950 until 1953 and from 1966 until 1968 – he has been employed by Southern since that date, a total of approximately 30 years. Plaintiff has held a variety of jobs during his career at Southern, generally climbing the promotional ladder. In January of 1971, Pace was promoted to the position of Superintendent of Southern's Signal and Electrical ("S & E") Department. The S & E Department subsequently merged with the Communications Department to form the Communications and Signals ("C & S") Department. The former Superintendent of the Communications Department, J.T. Hudson ("Hudson"), became General Superintendent of Operations in the newly formed C & S Department. Plaintiff

initially served as Assistant General Superintendent - Operations in the newly merged department, but after approximately one year he was transferred to the position of Senior Construction Engineer. Plaintiff considered his transfer to this position to be a promotion. It is unclear as to exactly how Pace's superiors evaluated his performance as Senior Construction Engineer, but the record indicates that he received some criticism.[1]

As a result of several personnel changes in the C & S Department in 1974, plaintiff was reassigned to the position of Assistant General Superintendent-Operations, a position he held for approximately a year prior to becoming Senior Construction Engineer. During the same period of time, Hudson, the General Superintendent-Operations in the C & S Department was promoted to Assistant Vice-President of the C & S Department. F. H. McIntyre ("McIntyre") was promoted to the position of General Superintendent-Operations to fill the vacancy created by Hudson's promotion to Assistant Vice-President. McIntyre's prior position had been that of Assistant General Superintendent-Operations, and plaintiff's reassignment to that position was necessitated by McIntyre's promotion. Plaintiff considered his transfer from the position of Senior Construction Engineer to the position of Assistant General Superintendent-Operations to be a demotion.[2]

Pace served as Assistant General Superintendent until November of 1978. At that time, plaintiff, then 51 years of age, was transferred to the position of Senior Development Engineer in the C & S Department. Plaintiff's replacement as

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[1] The record does not clearly reflect the nature or source of this criticism. *See* Deposition of Rayford C. Pace, pp. 55-62; Deposition of J. T. Hudson, pp. 58-59.

[2] Plaintiff considered this transfer to be a demotion even though he suffered no salary decrease or loss of job points. *See* Pace Deposition, p. 63. In this regard, the court notes that after plaintiff was transferred from the position of senior construction engineer, the position was upgraded to general superintendent of construction, with an accompanying increase in job points and reporting status.

Assistant General Superintendent-Operations was D. E. Barker ("Barker"). Barker was then 49 years of age, two years younger than Pace, and had been with Southern for approximately 22 years. For purposes of this motion, it will be assumed that Pace's transfer to Senior Development Engineer was a demotion. It is this transfer about which plaintiff now complains.

The position of Assistant General Superintendent-Operations from which plaintiff was transferred involved considerable administrative responsibilities. Defendent argues that plaintiff exhibited an inability to master the administrative tasks of the job, and that this resulted in his transfer. McIntyre, Pace's immediate supervisor, felt that Pace did not do a satisfactory job of accepting the administrative responsibilities of his position as Assistant General Superintendent, and that Pace failed to follow up and make sure that proper results were achieved. It was McIntyre's assessment that Pace had a poor attitude with regard to his job, and lacked sufficient motivation. Although conceding that Pace possessed considerable technical knowledge and skills, defendent felt that he did not perform up to his full capabilities, and that he could not handle the administrative duties. It is argued that Pace was aware of the criticisms of his performance, and the McIntyre had discussed the criticisms with him.

Plaintiff disagrees with most of the criticisms of his performance, and points to the fact that he received only one "Job Performance Appraisal" during the period of time that he served as Assistant General Superintendent-Operations. He apparently takes the position that he was not fully apprised of the criticisms until this Job Performance Appraisal. Although the appraisals are supposed to be made annually, the record reflects only one appraisal of Pace while he was Assistant General Superintendent, in May of 1976. In that appraisal, McIntyre gave plaintiff an overall rating of adequate, the second lowest rating one can receive. Most of the above criticisms of plaintiff's performance were made in the appraisal. McIntyre's supervisor, HUDSON, CHANGED Pace's overall rating to competent. However, he stated that an officer on

Pace's level should have received a better evaluation. Pace did discuss his performance evaluation with McIntyre, and although he disagreed with some aspects of the evaluation, he admitted that some of the criticisms of his performance were reasonable.

Pace argues that his superiors exhibited a bad attitude towards him. Specifically, he complains of his regular exclusion from decisionmaking meetings, the failure to invite him to attend trips to company-owned resort areas, the lack of opportunities to ride inspection trains, and other indications of differential treatment. He argues that these factors had a negative effect on his motivation. Further, Pace points to the fact that he received a six percent merit pay increase in 1977 as an indication that he was performing satisfactorily.

McIntyre testified in his deposition that during the time from the 1976 job appraisal until plaintiff's eventual transfer, plaintiff failed to improve his performance in the specific areas which had been subject to criticism. He further stated that he frequently counseled Pace with regard to the continuing problems, and that he also discussed the matter with Hudson. Hudson testified that he did have discussions with McIntyre regarding Pace's performance, and that he was sure he had also discussed the matter with Pace.

Pace testified that he first became aware of the extent to which there was dissatisfaction with his performance in a meeting with Hudson and McIntyre in July of 1978. In that meeting, Hudson then informed Pace of his intention to move Pace to another job position. Pace testified that he was totally surprised at that revalation, and he told his superiors that he intended to do all he could to fight a transfer. McIntyre stated that this meeting was the first instance that a position change for Pace was explicitly discussed, although there had been previous discussions regarding Pace's allegedly deficient performance. In September of 1978, McIntyre wrote a letter to Hudson regarding Pace's performance. In the letter, McIntyre made criticisms of Pace's performance similar to those discussed above. McIntyre recommended that Pace be given another position

within the department where his skills could be better utilized. Subsequent to receiving the letter, Hudson discussed it with McIntyre. McIntyre reiterated his position that a transfer was necessary, stating that Pace's performance had not shown any improvement over the years. In November of the same year, Pace was "demoted" to the position of Senior Development Engineer.

Southern argues that, under the above facts, it is entitled to judgment as a matter of law because plaintiff has failed to establish a prima facie case of age discrimination. Additionally, Southern contends that even if the court was of the opinion that a prima facie case had been established, it would still be entitled to summary judgment because plaintiff cannot sustain his burden of proving age discrimination. In other words, Southern contends that even if plaintiff has established a prima facie case of age discrimination, he cannot rebut defendant's evidence that plaintiff was discharged for reasons other than his age.

In *McDonnell Douglas Corporation v. Green,* 411 U.S. 792 (1973), the Supreme Court set forth a four-pronged test for establishing a prima facie case of employment discrimination in a case under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.* [3] The Fifth Circuit has adapted the *McDonnell Douglas* for purposes of establishing a prima facie case under the ADEA. *See Marshall v. Goodyear Tire & Rubber Company,* 554 F. 2d 730 (5th Cir. 1977); *Wilson v. Sealtest Foods Division of Krafto Corporation,* 501 F. 2d 84 (5th Cir. 1974. [4] Thus, a prima facie case of age discrimination can be established by a plaintiff's demonstration that "(1) he

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[3] To establish a prima facie case of race discrimination, a plaintiff must prove that (1) he is a member of a racial minority; (2) he was qualified and applied for a job which the employer was seeking to fill; (3) he was rejected despite his qualifications; and (4) the employer continued to seek applicants for the position after the plaintiff's rejection. Although *McDonnell* set the standards for establishing a prima facie case of racial discrimination in hiring, those factors have been adapted to apply to other types of employment decisions in the Title VII context.

[4] In the absence of Eleventh Circuit authority, this court is bound to apply Fifth Circuit law.

was a member of the protected group, (2) he was discharged, (3) he was replaced with a person outside the protected group, and (4) he was qualified to do the job." *Price v. Maryland Casualty Company,* 561 F. 2d 609 (5th Cir. 1977). In *Price,* the Court held that the plaintiff employee had failed to establish a prima facie case because he could not show that he was replaced by a person outside of the protected group. [5]

Since the decision in *Price,* the applicability of the above test has been reaffirmed. *See Simmons v. McGuffey Nursing Home, Inc.,* 619 F. 2d 369 (5th Cir. 1980); *Marshall v. Westinghouse Electric Corporation,* 576 F. 2d 588 (5th Cir. 1978). However, some courts have recognized that the *McDonnell Douglas* test is not the only method of establishing a prima facie case of employment discrimination. In *McCorstin v. United States Steel Corporation,* 621 F. 2d 749 (5th Cir. 1980), the Court stated that the *McDonnell Douglas* test was "not the alpha and omega of possible tests in the age discrimination context." 621 F. 2d at 753. The court thus recognized that the *McDonnell Douglas* test may not be applicable to all factual situations, and that other tests may at times be appropriate. In that case, the Court held that a prima facie case was established by evidence indicating a pattern of terminating older employees when there was a reduction in force.

Similarly, in *Moore v. Sears Roebuck & Company,* 464 F. Supp. 357 (N. D. Ga. 1979), Judge Freeman of this district held that the *McDonnell Douglas* standard was not the only method of establishing a prima facie case. It was recognized that different factual situations may require different standards for establishing a prima facie case. The Court stated that a plaintiff could make out a prima facie case "if he shows: (1) that he was a member of the protected class; (2) that he was discharged; (3) that he was qualified for the position he held; and (4) if, in addition, he (a) shows he was replaced by a person younger than himself, (b) produces direct evidence of discriminatory intent, or (c) produces statistical evidence of discriminatory conduct." 464 F. Supp. at 363. Thus, in *Sears,* the Court replaced one

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[5] 29 U.S.C. §631 (a) defines the group protected by the ADEA as those between the ages of 40 and 70.

element of the previously enunciated Fifth Circuit test, the requirement that the plaintiff be replaced by a member outside of the protected class, with the requirement that the plaintiff be replaced by a person younger than himself. Further, the Court added two additional methods of establishing a prima facie case, statistical evidence indicating discriminatory conduct, and direct evidence of discrimination. In *Sears,* the Court held that the plaintiff had successfully defeated the summary judgment motion by the presentation of statistical evidence.

Plaintiff argues that the test articulated in *Price* and other Fifth Circuit cases has been seriously eroded by the holdings in *McCorstin* and *Sears.* This court disagrees. In both *Sears* and *McCorstin,* the courts merely recognized other methods of establishing a prima facie case of age discrimination. Neither court abandoned the *McDonnell Douglas* test, but merely cautioned against its rigid application. The *McCorstin* Court explicitly stated that its discussion of other tests should "not be construed as a denunciation of the *McDonnell* test." 621 F. 2d at 754. The Court held that other tests are applicable in cases where the *McDonnell* test "was not intended to apply and, factually, cannot apply..." 621 F. 2d at 754. The implication of this statement is that the *McDonnell Douglas* test should be applied where appropriate.

Any doubts as to the continued vitality of the *McDonnell Douglas* standard should be resolved by the recent opinion of the Fifth Circuit in *Williams v. General Motors Corp.,* 656 F. 2d 120 (5th Cir. 1981) (Unit B). In *Williams,* the Court approved the concept of a flexible approach in determining whether a prima facie case had been established. In fact, the Court actually applied a different test in *Williams,* a case involving a reduction in force. [6] However, the Court explicitly stated that "we will, of course, apply the *Price* elements in proper cases..." 656 F. 2d at 128. Moreover, although the Court did not apply the four-pronged test in the *Williams* case, the test was applied

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[6] Application of the new test resulted in a decision that plaintiffs had failed to establish a prima facie case.

to another case decided on the same day, *Ford v. General Motors Corporation,* 656 F. 2d 117 (5th Cir. 1981) (Unit B). In *Ford,* a "failure to promote" case, the Court noted that the *McDonnell Douglas* standard was applicable to the case, *see* 656 F. 2d at 118, n. 2, and held that the plaintiff had failed to establish a prima facie case. Thus, from a review of *Williams* and *Ford,* it is clear that the *McDonnell Douglas* test maintains its viability in appropriate cases. As this is a straightforward "demotion" case, the court concludes that the *McDonnell Douglas* test is applicable.

Under the *McDonnell Douglas* test, the plaintiff in this case must show the following to establish a prima facie case: (1) that he is a member of the protected age group; (2) that he was demoted from a given position; (3) that his replacement was outside the protected age category; and (4) that he was qualified for the position. Applying this test to the case sub judice, the court is of the opinion that plaintiff has failed to establish a prima facie case. At least one element of the above test is missing from plaintiff's proof.

Plaintiff has not demonstrated that he was replaced by a person outside of the protected age group. In fact, plaintiff's replacement was only two years younger than plaintiff, and is clearly within the protected age group. Thus, this element is clearly not present. Even if the court applied the modified standard enunciated in *Sears,* i.e., that plaintiff show that he was replaced by a person younger than himself, it is doubtful that plaintiff could prevail. This court is of the opinion that the difference in plaintiff's age and his replacement's age, a mere two years, is insufficient to raise an inference of age discrimination. If Southern demoted Pace because of his age, it is unlikely that it would replace him with someone only two years his junior. Thus, this court concludes that plaintiff has failed to establish a prima facie case under the *Price* standard as he has not demonstrated that he was replaced by someone outside of the protected age group, or that he was replaced by someone substantially younger than himself so as to raise an in-

ference of age discrimination.[7]

In sum, the court concludes that plaintiff has not established a prima facie case of age discrimination under the standards adopted by the Fifth Circuit in *Price*. Specifically, plaintiff has failed to show that he was replaced by a person outside of the protected group.

Although the court has reviewed plaintiff's case under the test set forth in *Price*, it does not appear that a different result would obtain under other tests for establishing a prima facie case. In *Moore v. Sears Roebuck & Company, supra*, the Court concluded that a prima facie case could be presented by statistical evidence indicating discriminatory actions. In this case, plaintiff has failed to proffer sufficient statistical evidence to indicate a pattern of discriminatory treatment of older employees. In support of his case, plaintiff points out that there were ten demotions of members in the protected class within his department within the last 15 years. Out of the 10 demotees, plaintiff states that 8 were replaced by individuals younger than them. However, defendent points out that only 4 of the 10 demotees were replaced by individuals outside of the protected class. Moreover, defendent points out that several individuals within the protected class were promoted during this period of time.[8] The court is of the opinion that the statistical evidence proffered by plaintiff is insufficient to establish a prima facie case of age discrimination.

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[7] Although not addressed by the parties, it appears that a second element of the test may also be missing from plaintiff's evidence. Plaintiff has not set forth any proof that he was qualified for the position from which he was demoted. Although the fact that he held the position at one time could raise a presumption as to his qualification, the reasons for his demotion articulated by Southern would rebut any such presumption. The only proof regarding plaintiff's qualifications, other than his deposition statement, consists of Southern's evidence that he lacked sufficient administrative skills for the position. Although there is evidence in the record that plaintiff possessed adequate technical knowledge for the position, apparently the job also required some degree of administrative proficiencies in which defendent has indicated plaintiff was lacking. Thus, as plaintiff has failed to proffer proof of his qualifications for the position, this element of a prima facie case has not been established.

[8] In fact, plaintiff was promoted during the 15-year period.

First, the statistical sample is not large enough to allow any reasonable inferences to be drawn therefrom. Ten demotions over a period of 15 years does not present a sample from which valid conclusions can be drawn. However, even assuming that there was a valid statistical sample, no pattern of discriminatory treatment has been demonstrated. The fact that 4 out of 10 demotees were replaced by individuals outside of the protected class does not demonstrate a pattern of discriminatory treatment for older employees. *See Wade v. New York Telephone Company*, 24 E.P.D. ¶17, 637.

A prima facie case of age discrimination can also be established by direct evidence of discriminatory conduct, that is, a "smoking gun". For example, if there were some job advertisement indicating an age preference or a note indicating some age preference then such evidence alone would be sufficient to establish a prima facie case. However, the record is clear that there is no such direct evidence in this case. The only evidence of age discrimination is plaintiff's belief that he was demoted because of his age since he could think of no other reason. This is insufficient to establish a prima facie case of age discrimination.

CONCLUSION

For the foregoing reasons, the court has concluded that plaintiff has failed to establish a prima facie case of age discrimination under any available theory. Thus, defendent's motion for summary judgment is hereby GRANTED. The clerk is DIRECTED to enter judgment accordingly.

SO ORDERED, this ____ day of _____, 1981.

_____

HORACE T. WARD
UNITED STATES DISTRICT JUDGE

APPENDIX "B"

IN THE UNITED STATE COURT OF APPEALS
ELEVENTH CIRCUIT

RAYFORD C. PACE Plaintiff-Appellent	:	CIVIL ACTION
vs.	:	NO. 81-8021
SOUTHERN RAILWAY SYSTEM Defendent-Appellee	:	

April 4, 1983

Appeal from the United States District Court for the Northern District of Georgia.

Before FAY and KRAVITCH, Circuit Judges, and MORGAN, Senior Circuit Judge.

KRAVITCH, Circuit Judge:

This is an appeal from a grant of summary judgment in favor of defendent-appellee, Southern Railway System, in an action brought by Rayford C. Pace, plaintiff-appellant, under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621 *et seq.* Appellent alleged that appellee discriminated on the basis of his age in its decision to demote him. The court below, 530 F. Supp. 381, granted summary judgment, concluding that appellant had failed to establish a prima facie case of age discrimination. We affirm.

Appellant was first employed by Southern in 1944. Including two brief periods in which appellant left appellee's employ,[1] he has been employed by Southern for over thirty years. During that period he held a variety of jobs. In January 1971, Pace was promoted to the position of Superintendent of the Signal and Electrical Department (S & E). S & E subsequently was merged

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[1] Appellant was not employed by Southern between 1950 and 1953, and 1966 and 1968.

with another department to form the Communications and Signals Department (C & S). The superintendent of the former Communications Department, J. T. Hudson (Hudson), became General Superintendent of Operations in the new C & S. Initially, appellant was Assistant General Superintendent-Operations in C & S, but after one year was transferred to the position of Senior Construction Engineer. Appellant considered this transfer a promotion. In 1974, appellant was reassigned to the previous position of Assistant General Superintendent-Operations. He considered this a demotion. Near this time Hudson was promoted to Assistant Vice President of the C & S Department. F. H. McIntyre (McIntyre) was promoted to General Superintendent-Operations. Thus, Hudson was McIntyre'S IMMEDIATE SUPERIOR AND McIntyre was immediately above the appellant in the Southern Railway hierarchy.

Appellant retained his position as Assistant General Superintendent until November 1978 when he was transferred to Senior Development Engineer in C & S. At this time, appellant was fifty-one years old. Both parties and the court below have treated this transfer as a demotion. Appellant was replaced as Assistant General Superintendent by D. E. Barker (Barker), who was then forty-nine years old, had been with Southern for twenty-two years, and had been rated "competent" on his last performance appraisals. Barker, in turn, was replaced in his former position of Assistant Director of Engineering in C & S by A. L. White, age forty-five. In depositions reviewed in conjunction with the motion for summary judgment, McIntyre and Hudson asserted that the reason for the demotion was appellant's inability to carry out effectively the significant administrative responsibilities associated with the Assistant General Superintendent-Operations position. Appellee contends that appellant was aware of his superior's criticism of his administrative abilities. It alleges that McIntyre and Hudson discussed these difficulties with him on several occasions.

Appellant argues that he "recalls no discussions or criticisms of his job performance" from the date of a 1976 job perfor-

mance appraisal until the notification of the demotion in 1978.[2] The formal job appraisal in 1976, filled out by McIntyre, reflected that appellant's technical abilities were sound, criticized his administrative abilities and rated him overall as "adequate", the second lowest possible rating. Hudson later indicated the rating should be raised one category to "competent." Appellant attempts to refute the negative aspects of the appraisal by stating that he "disagreed with the bulk of this assessment of his work."[3]

In deposition appellant testified that he first learned of the extent of the dissatisfaction with his work in July, 1978 in a meeting with Hudson and McIntyre. There Hudson informed appellant that he intended to transfer him to another job. McIntyre indicated that this was the first he knew of any such decision but had been involved in previous discussions regarding Pace's allegedly inadequate performance. In September, McIntyre wrote a letter to Hudson suggesting Pace be given a different position involving fewer administrative duties and where his technical skills could be better utilized. The demotion to Senior Development Engineer occurred in November, 1978.

Appellant argues that the grant of the motion for summary judgment was error because material facts and factual inferences were in dispute and because, contrary to the district court's conclusion, he had established a prima facie case of age discrimination. Appellee contends that no prima facie case was established and that none of appellant's asserted issues of disputed fact are material in that none are probative of the material issue in the case: discrimination.

In granting appellee's motion for summary judgment, the district court concluded that appellant had failed to make out a prima facie case of age discrimination and, therefore, defendant was entitled to judgment as a matter of law.

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[2] Plaintiff's Statement of Material Facts in Opposition to Motion for Summary Judgment at 2.

[3] *Id.*

Much time was consumed at oral argument and much space allotted in the briefs of both parties on the question of the proper test to be applied in determining whether a prima facie case has been established. Appellees argue that a four prong *McDonnell Douglas* type test is appropriate in all cases other than those involving reduction-in-force. The *McDonnell Douglas* test was developed in context of suits under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq. see McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973),[4] but has been applied in a slightly altered form to actions under the ADEA. *Price v. Maryland Casualty Co.*, 561 F. 2d 609, 612 (5th Cir. 1977).[5] *See also Houser v. Sears Roebuck & Co.*, 627 F. 2d 756, 757 (5th Cir. 1980). In order to establish a prima facie case of discrimination under this test, a plaintiff must prove (1) that he is a member of the protected group;[6] (2) that adverse employment action was taken against him, *e.g.* discharge, demotion, failure to hire; (3) he was replaced by a person outside the protected group; and (4) he was qualified for the position for which he was rejected. *Price v. Maryland Casualty Co.*, 561 F. 2d at 612. *Cf. Simmons v. McGuffey Nursing Home, Inc.*, 619 F. 2d 369 (5th Cir. 1980), *Marshall v. Westinghouse Electric Corp.*, 576 F. 2d 588 (5th Cir. 1978); *Marshall v. Goodyear Tire & Rubber Co.*, 554 F. 2d

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[4] In *McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. at 1824, the Court stated one method for establishing a prima facie case of race discrimination under Title VII where a job application is rejected is for a plaintiff to show:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

[5] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) this court adopted as precedent all decisions of the former Fifth Circuit decided prior to October 1, 1981.

[6] As of January 1, 1978, the protected group under the ADEA includes persons at least forty years of age but less than seventy years of age. 29 U.S.C. §631(a). Prior to that time, the protected group was between forty and sixty-five years of age.

730, 735-36 (5th Cir. 1977) (test modified further in later cases where plaintiff discharged from previously held position; the prong requiring proof of qualification is removed and plaintiff must prove not only that the employer replaced him with someone outside the protected group but also specifically had sought to replace him with a younger person).[7]

Appellee encourages application of this test because, as the district court found, appellant cannot show that he was replaced by one outside the protected age group. Appellant's replacement, Barker, was forty-nine years old at the time he replaced appellant. Thus, if the modified *McDonnell Douglas* test, as set forth in *Price, supra,* were the exclusive means of establishing a prima facie case under the ADEA appellant clearly could not succeed.

As the district court, the appellee, and the appellant all have realized, however, the *NMcDonnell Douglas/Price* test is not

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[7] A plaintiff discharged by his employer and suing under the ADEA " 'makes out a prima facie case by showing [1] that he was within the statutorily protected age group, [2] that he was discharged, [3] that the employer sought to replace him with a younger person and [4] that he was replaced with a younger person outside the protected group.' " *Simmons v. McGuffey Nursing Home, Inc.*, 619 F. 2d 369 (5th Cir. 1980), quoting *Marshall v. Westinghouse Electric Corp.*, 576 F. 2d 588, 590 (5th Cir. 1978). Recent cases indicate that affirmative proof of qualification still is required in failure to hire or failure to promote cases. *See Ford v. General Motors Corporation*, 656 F. 2d 117, 118-19 n. 2 (5th Cir. Unit B 1981). The discrepency between these cases can be resolved by recognizing that in discharge or demotion cases, where a plaintiff has held a position for a significant period of time, qualification for *that* position, sufficient to satisfy the test of a prima facie case can be inferred. However, where the position sought has not been held previously, there is no basis for an inference of qualification.

The district court held that, in addition to failing to prove that he was replaced by a person outside the protected group or in any other way to prove the nexus between the demotion and a discriminatory motive, Pace failed to prove he was qualified for the position from which he was demoted. Because we affirm on another ground the finding that appellant failed to establish a prima facie case, and thus affirm the grant of summary judgment, we need not decide whether Pace was qualified for the position. Assuming the above analysis, however, direct proof of qualification for the position from which he was demoted would not be required.

the sole method of establishing a prima facie case of age discrimination. Indeed in *McDonnell Douglas* the Supreme Court noted: "The facts necessarily will vary in Title VII cases, and the specification above the prima facie proof required...is not necessarily applicable in every respect to differing factual situations." *McDonnell Douglas Corp. v. Green*, 411 U.S. at 802 n. 13, 93 S. Ct. at 1824 n. 13. The particular circumstances of some age discrimination cases require flexibility in analyzing whether a prima facie case has been established. The most obvious need for flexibility is present in reduction in force cases, where an employee is discharged and is not replaced at all, but alleges that his selection as the one to be discharged is motivated by discrimination based on his age. This court previously has recognized the need for flexibility in such cases. *McCuen v. Home Insurance Co.*, 633 F. 2d 1150 (5th Cir. Unit B 1981); *McCorstin v. United States Steel Corp.*, 621 F. 2d 749 (5th Cir. 1980). *McCuen* stated:

> Title 29 U.S.C.A. § 623 (a)(1) makes it unlawful for an employer 'to discharge any individual...because of such individual's age.' *Interpreting the statute so as to limit its protection to those instances when a covered employee is replaced by a non-covered employee would permit an employer to fire a 69-year old employee solely because of his age and replace him with a 40-year-old.* It would also afford no protection against discrimination on the basis of age when a work force is being reduced.

McCuen v. Home Insurance Co., 633 F. 2d at 1151 (emphasis added).

As *McCuen* indicates, reduction in force situations are not the only instances in which the facts of a particular case will present a prima facie case even though the plaintiff was not replaced by one outside the protected age category. The particularly amorphous nature of age discrimination counsels against rigid application of a *McDonnell Douglas / Price* test.

> A mechanistic application of the *McDonnell* prima Facie test is especially dangerous in the context of age discrimination.

> Seldom will a sixty-year-old be replaced by a person in the twenties. Rather the sixty-year-old will be replaced by a fifty-five-year-old, who, in turn, is succeeded by a person in the forties, who also will be replaced by a younger person. Eventually, a person outside the protected class will be elevated, but rarely to the position of the one fired.

McCorstin v. United States Steel Corp., 621 F. 2d at 754. In *McCorstin*, as in *McCuen*, the court noted that, not only in reduction in force cases, but also in ADEA cases where the evidence shows a pattern of replacing employees with younger personnel, the court must be open to alternative methods of proof of a prima facie case.

> [B]ecause the discrimination involves age, rather than sex or race, a requirement that the replacement be from a nonprotected group fails to take the reality of the working place into account. Because of the value of experience rarely are sixty-year-olds replaced by those under forty. The replacement process is more subtle but just as injurious to the worker who has been discharged. That the person is replaced by a person ten years younger rather than twenty years does not diminish the discrimination; the subtlety only tends to disguise it.

Id.

We therefore reaffirm that the *McDonnell Douglas / Price* test, while a viable one, is "not the alpha and omega of possible tests in the age discrimination context."
McCorstin, 621 F. 2d 753.

[1, 2] This conclusion does not leave the courts standardless in determining whether a prima facie case has been established. Rather such a determination turns on whether the plaintiff has presented sufficient evidence to provide a basis for an inference that age was a factor in the employment decision. *See Simmons v. McGuffey Nursing Home, Inc.*, 617 F. 2d at 370; *Marshall v. Goodyear Tire & Rubber Co.*, 554 F. 2d at 735. Any particular test is only a tool to facilitate evaluation of the proof and to aid the court in evaluating whether a basis for an inference of discrimination has been created. Once it has been established, the

prima facie case serves as a rebuttable presumption that the employer unlawfully discriminated against the plaintiff, requiring the defendant to come forward with a legitimate, non-discriminatory reason for the action. *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 254-56, 101 S. Ct. 1089, 1094. 67 L.Ed. 2d 207 (1981). Thus, no matter what test is used, the overall assessment of whether a prima facie case has been established must turn on whether, on the particular facts of a given case, the plaintiff has presented proof of a kind and quantity that requires the defendant to come forward with non-discriminatory reasons for the adverse employment action.

In the instant case, Pace seeks to show the nexus between his demotion and a discriminatory motive by utilizing an alternative to the third prong of the *McDonnell Douglas / Price* test which requires a showing that he was replaced by one outside the protected group. Assuming all other prongs of the *McDonnell Douglas / Price* test have been satisfied, we focus our inquiry on whether appellant has shown sufficiently the nexus between his demotion and age discrimination.

[3-5] Certainly, where a plaintiff has adduced proof meeting all prongs of the *McDonnell Douglas / Price* test including evidence that he was replaced by one outside the protected age group, a prima facie case is made out. Likewise, if there is direct evidence of discriminatory intent a prima facie case will be established. *See Spagnuolo v. Whirlpool Corp.,* 641 F. 2d 1109, 1113 (4th Cir. 1981). No such evidence has been presented here.

[6] Another method of establishing the nexus between age discrimination and adverse employment action is by statistical proof of a pattern of discrimination. In those situations, such as that presented in *McCorstin,* where all elements of the *McDonnell Douglas / Price* test are met except for proof that the plaintiff was replaced by one outside the protected group, statistical proof or other "evidence of a pattern of terminating older workers... allow[s] the reasonable inference that age had played a role in appellant's discharge." *McCorstin v. U.S. Steel Corp.,* 621 F. 2d at 754. *See also Hodgson v. First Federal Savings & Loan Association,* 455 F. 2d 818 (5th Cir. 1972); *Moore vs.*

Sears, Roebuck & Co., 464 F. Supp. 357 (N.D.Ga. 1979). If a plaintiff seeks to rely on proof of a pattern of discrimination to satisfy this pertinent element of a prima facie case, he has the burden of presenting such statistical evidence that will, in conjunction with the other elements, give rise to an inference of discrimination.

Here appellant presented statistics showing the reassignments in the C & S Department, occurring in November, 1978, the time of his demotion. There were eleven such reassignments. Six were promotions. Four of the persons promoted were in the protected group and were older than their predecessors; two of those predecessors also were promoted and two were transferred. Two of the promotions were of persons younger than their predecessors but the predecessors also were promoted. Four of the reassignments were transfers. Apparantly all of the transferees were younger than their predecessors but one replaced an employee who retired, one replaced an employee who also was transferred (Barl :r), one replaced a deceased employee, and one replaced appellant who had been demoted. Appellant was the only employee demoted at this time and he was replaced by a younger employee.

[7] These statistics fail to satisfy appellant's burden. Clearly, no discriminatory pattern is established. Indeed, the fact that of the six promotions four were of persons within the protected group and the only promotions of persons outside the group were coupled with promotions of the older predecessors, negates an argument of a pattern of discrimination. Furthermore, a statistical analysis of promotions would be persuasive evidence of discriminatin only if plaintiff proffered evidence of the percentage of persons in the protected age group who were promoted as compared to the percentage of persons outside the protected group who were promoted. Appellant has failed to place these statistics in a relevant context. *Lindsey v. Southwestern Bell Telephone Co.*, 546 F. 2d 1123, 1124 (5th Cir. 1977).

Appellant also presents evidence of the demotions occurring in the C & S and S & E departments from 1966 to 1978. Of the

twelve persons demoted, ten were in the protected age group, four were replaced by persons outside the protected group, and eight were replaced by persons younger than themselves. The district court found that this statistic failed to show a pattern of discrimination because the sample size was too small and because replacement of four of the ten demotees with persons outside the protected group does not establish a pattern of discrimination. While at first the statistics may appear to indicate a pattern of demoting older workers similar to that found in *McCorstin,* they are flawed in one vital respect. Appellant fails to show what percentage of the employee population in the C & S and S & E departments was in the protected age group and what percentage was not. If a substantial majority of the employee population of the department was composed of persons in the protected age group, the fact that 83% of those demoted were in the protected group is not by itself significant. *Id.*

Appellant also proffers evidence that only ten of the thirty-six employees promoted into the plaintiff's work area between January 1978 and October 1979 were in the protected group. This statistic, too, is of no avail when not placed in a relevant context. In many work environments, promotion into a particular department will be of persons with lesser experience. Those with the requisite experience or knowledge are likely already to be in the department in which they will remain. Evidence of promotions *into* the department may be significant but only if compared to promotions into other departments within the company or into comparable departments in other companies. Standing alone, the statistics proffered give the court no basis for inferring a discriminatory pattern. *Id.* at 1124 (statistical evidence insufficient because failed to make comparison to general population).

Having failed to place any of the statistical data within a relevant framework or to present evidence allowing this court to construct the framework in which the evidence proffered by appellant would be relevant, we affirm the district court's finding that the statistical data fails to show a pattern of discrim-

ination. Appellant has failed, therefore, to make out a prima facie case by proof of a pattern of discrimination.

[8] Appellant also submits that the element of a prima facie case at issue here is established because appellant was replaced by someone two years his junior who in turn was replaced by someone four years younger and this alone gives rise to an inference of age discrimination. In *Moore v. Sears, Roebuck & Co.*, 464 F. Supp. 357 (N.D.Ga. 1979), the district court, recognizing the need for flexibility in assessing proof of a prima facie case in an ADEA action, indicated that a prima facie case may be established if, in addition to proving he was in the protected class, was qualified and was discharged, a plaintiff "(a) shows he was replaced by a person younger than himself, (b) produces direct evidence of discriminatory intent, or (c) produces statistical evidence of discriminatory conduct." *Id.* at 363 (footnote omitted). The conclusion that replacement by a younger person will support a prima facie case was founded in part on a Department of Labor (DOL) interpretive rule in which the DOL concludes that replacement of a protected employee by one also within the protected group does not preclude a finding of a prima facie case of discrimination. *See* 49 C.F.R. § 860.91. *See also Spagnuolo v. Whirlpool Corp.*, 641 F. 2d 1109 (4th Cir. 1981) (53-year old demoted employee replaced by 40-year old successfully established ADEA claim). Indeed, the Ninth Circuit has held that "replacement by even an older employee will not necessarily foreclose prima facie proof if other direct or circumstantial evidence supports an inference of discrimination." *Douglas v. Anderson*, 656 F. 2d 528, 533 (9th Cir. 1981).

We agree with the tenor of these cases in so far as they establish that replacement by one within the protected category will not *preclude* proof of a prima facie case. However, in no case does the court hold that as a matter of law a prima facie case is established if a plaintiff simply shows he is in the protected group, was adversely affected by an employment decision, was qualified and was replaced by one younger than himself. In each of these cases not only was the plaintiff replaced by someone younger but there also was other evidence

of discrimination based on age. In *Moore* the district court explicitly found that the plaintiff had produced sufficient statistical data of discrimination to preclude summary judgment. That the plaintiff had been replaced by one younger yet still in the protected class was only an additional ground for finding that a prima facie case had been established. In *Spagnuolo,* the Fourth Circuit affirmed a judgment for an ADEA plaintiff who had shown not only that he was replaced by someone thirteen years younger but within the protected group but also had presented direct evidence of purposeful discrimination by the defendent *Spagnuolo v. Whirlpool Corp.* 641 F. 2d at 1113. In *Douglas* through a directed verdict for the defendent was affirmed, the Ninth Circuit held that the plaintiff had made out a prima facie case. The plaintiff had shown that he was replaced by someone younger than himself, yet within the protected age group, and also had presented "substantial evidence of satisfactory job performance." *Douglas v. Anderson,* 656 F. 2d at 533. The Ninth Circuit noted that an inference of age discrimination can be established when all other elements of a *McDonnell Douglas/ Price* test are established but, instead of replacement by one outside the protected group, the plaintiff "was replaced by a *substantially* younger employee with equal or inferior qualifications." *Id.* at 533 (emphasis supplied). The court aptly observed that "[i]f the replacement is only slightly younger than the plaintiff, then it is less likely that an inference of discrimination can be drawn." *Id.* In *Douglas,* the replacement was only five years younger than the plaintiff but the substantial evidence of qualifications of the plaintiff served to heft the plaintiff over the line between failure and success in establishing a prima facie case. A prima facie case may be established only when there is a basis for inferring that discrimination is the reason for the employment decision and in none of the cases discussed was the fact that the replacement was younger than the plaintiff enough, standing alone, to give rise to that inference.

In the instant case, the district court held that the two year differential between the appellant and his replacement was not substantial enough to satisfy the relevant prong of the prima

facie test. We make no ruling as to whether in another case where, in addition to a two year age differential there is statistical proof of a pattern of discrimination or direct proof of discriminatory intent, a prima facie case may be established. Here, however, where the replacement was only two years younger than appellant, there was no direct proof of discriminatory intent, and no statistical evidence showing a pattern of discriminatory activity, we affirm the district court's finding that plaintiff's proof failed to give rise to an inference of age discrimination, and to establish a prima facie case of age discrimination.

Given appellant's failure to establish even a prima facie case, the district court correctly granted defendent's motion for summary judgment. Summary judgment may be granted only when "there is no genuine issue as to any material fact and...the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P 56(c). *See Warrior Tombigbee Transportation Co., Inc. v. M/V Nan Fung,* 695 F. 2d 1294 at 1296 (11th Cir.1983); *Clemons v. Dougherty County, Georgia,* 684 F. 2d 1365, 1368 (11th Cir. 1982). In reviewing a grant or denial of summary judgment this court applies the same standards as those by which the district court is controlled, *Warrior Tombigbee Transportation Co., Inc. v M/V Nan Fung, supra.* 695 F. 2d at 1296. In deciding whether the party seeking summary judgment has met the exacting burden justifying summary judgment, "[a]ll reasonable doubt about the facts should be resolved in favor of the non-movant." *Clemons v. Dougherty County, Georgia.* 684 F. 2d at 1369.

[9, 10] Appellant, in response to appellee's motion for summary judgment, presented a list of "material facts" allegedly in dispute: an explanation of the requirements of the job from which he was demoted; a statement that his last performance evaluation rated him as only "competent" (although he disagreed with some of its substance and recalled no other discussions of his job performance); an 8% salary increase in 1974 and a 6% increase in 1977, both intended to reward at least adequate performance; his own and his immediate supervisor's

surprise at his demotion; his replacement by one with a job rating equal to but no better than appellant's and his successor's replacement by one rated no higher than appellant; an assertion that appellant was the only employee demoted in November 1978, and since 1966, 8 of 10 demotees in the relevant departments have been replaced by younger men. Even viewing all these "facts", in the light most favorable to the appellant, we hold that appellant has failed to show a prima facie case of age discrimination. While establishing a prima facie case in and of itself does not always suffice for an ADEA plaintiff to survive a motion for summary judgment, *see Simmons v. McGuffey Nursing Home, Inc.*, 619 F. 2d 369, 371 (5th Cir. 1980), failure to establish a prima facie case warrants summary judgment. By definition, failure to establish a prima facie case means that the plaintiff has failed to proffer proof sufficient to impose even a burden of rebuttal on the defendant. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. at 253-54, 101 S.Ct. at 1093-94. Where the ADEA plaintiff has shown "no evidence 'which might infer that age was even a factor in the decision' " of which plaintiff complains summary judgment is warranted. *Simmons v. McGuffey Nursing Home, Inc.*, 619 F. 2d at 370. A plaintiff, when faced with a motion for summary judgment, cannot rely on attenuated possibilities that a jury would infer a discriminatory motive, but rather must come forward with sufficient evidence to establish a prima facie case and respond sufficiently to any rebuttal by the defendant to create a genuine issue of material fact. Even where a prima facie case has been established but the defendant has rebutted with a proffer of legitimate, nondiscriminatory reasons for the discharge, a genuine issue of material fact is not automatically presented. As the Supreme Court noted in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. at 254 n. 7, 101 S.Ct. at 1094 n. 7, once established a prima facie case creates a rebuttable presumption of discrimination; but this presumption alone does not create an inference that a material fact, sufficient to present a jury question, is in issue. *See also Reeves v. General Food Corp.*, 682 F. 2d 515, 521-22 & n. 9 (5th Cir.1982). *Cf. Moore v.*

Sears, Roebuck & Co., 464 F. Supp at 366 ("Only in an extraordinary instance could rebuttal evidence be so conclusive as to permit summary adjudication). In *Simmons, supra,* defendants rebutted plaintiff's prima facie case by showing a legitimate, nondiscriminatory reason for the discharge and plaintiff failed to prove that age, rather than the nondiscriminatory reason, was the motivation for the decision. 619 F. 2d at 371. This court held that summary judgment was appropriate because "[t]he possibility of a jury drawing a contrary inference sufficient to create a dispute as to a material fact does not reify to the point even of a thin vapor capable of being seen or realized by a reasonable jury." *Id.*

The possibility is even more remote here, reifying to neither a thin vapor nor a fine mist, because appellant has failed to establish a prima facie case. Therefore, summary judgment is particularly appropriate.[1] *Cf. Moore v. Sears, Roebuck & Co.*, 464 F. Supp. at 366 (summary judgment inappropriate where ADEA plaintiff can make out a prima facie case and arguably meritorious responses to defendant's rebuttal are presented).

Accordingly, we AFFIRM the judgment of the district court.

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[1] We note that even if a threshold prima facie case had been established, appellee successfully rebutted any inference of discrimination. In turn appellant has failed to respond to appellee's evidence that it was dissatisfied with appellant's performance. Taking as true that appellant was unaware between the 1976 performance appraisal and July of 1978 of the dissatisfaction with his performance and that Barker had no better performance ratings than did appellant, a basis for an inference of poor management and decisionmaking may be made out, but certainly no basis for an inference of discrimination. *see Simmons v. McGuffey Nursing Home, Inc.*, 619 F. 2d at 371.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-8021

RAYFORD C. PACE,

Plaintiff-Appellant,

versus

SOUTHERN RAILWAY SYSTEM,

Defendent-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

ON PETITION FOR REHEARING

June 2, 1983

Before FAY and KRAVITCH, Circuit Judges and MORGAN, Senior Circuit Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

United States Circuit Judge

REHG-4
(Rev. 6/82)

CERTIFICATE OF SERVICE

I, Rayford C. Pace, do hereby certify that I have this day served counsel for the opposing party in the foregoing matter with a copy of this revised petition for Writ of Certiorari to the Supreme Court of the United States by depositing in the United States mail a copy of same in a properly addressed envelope with adequate postage theron.

This 20th day of October, 1983.

Rayford C. Pace

RAYFORD C. PACE.

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No. 83-668

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

RAYFORD C. PACE,
Petitioner,

v.

SOUTHERN RAILWAY COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court review a decision of the United States Court of Appeals for the Eleventh Circuit which held, after careful consideration and analysis of a complete factual record and applicable authorities, that the quantum and quality of evidence presented by Petitioner was insufficient under any available legal theory to establish a prima facie case of alleged age discrimination?

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Respondent.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Southern Railway Company respectfully requests that this Court deny the Petition for Writ of Certiorari seeking to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.[1]

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[1] In accordance with the provisions of Sup. Ct. R. 28.1, the following is a listing of the parent company, subsidiaries and affiliates of Southern Railway Company: Norfolk Southern Corporation; Norfolk and Western Railway Company; The Cincinnati, New Orleans & Texas Pacific Railway Company; The Alabama Great Southern Railroad Company; New Orleans Terminal Company; Georgia Southern & Florida Railway Company; St. Johns River Terminal Company; Tennessee, Alabama & Georgia Railway Company; Central of Georgia Railroad Company; Interstate Railroad Company; Atlantic & East Carolina Railway Company; Live Oak, Perry & South Georgia Railway Company; Lamberts Point Barge Company, Inc.; Norfolk Southern Marine Services, Inc.; Norfolk & Portsmouth Belt Line Railroad Company; and NS Transportation Brokerage Corporation.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported as *Pace v. Southern Railway System*, 701 F.2d 1383 (11th Cir. 1983). It is reproduced at Appendix B-20 through B-34 of the Petition. The opinion of the United States District Court for the Northern District of Georgia is reported as *Pace v. Southern Railway System*, 530 F. Supp. 381 (N.D. Ga. 1981). That opinion is reproduced at Appendix A-9 through A-18 of the Petition.

JURISDICTION

The basis for invoking this Court's jurisdiction is 28 U.S.C. § 1254(1). The Eleventh Circuit opinion was issued on April 4, 1983, and a petition for rehearing on that decision was denied on June 2, 1983. (Petition, Appendix B-35)

REASONS FOR DENYING THE WRIT

I. Petitioner Has Failed To Establish Any Meritorious Reason For Granting A Writ Of Certiorari In This Case.

No reason exists for granting a writ of certiorari in this case. Petitioner does not (and cannot) contend that the decision of the Eleventh Circuit is in conflict with the decision of any other federal court of appeals on the same matter. Sup. Ct. R. 17.1(a). The Eleventh Circuit has not "decided an important question of federal law which has not been, but should be, settled by this Court," nor has it "decided a federal question in a way in conflict with applicable decisions of this Court." Sup. Ct. R. 17.1(c). The decision of this Court in *Lorillard v. Pons*, 434 U.S. 575 (1978), holding that a jury trial may be demanded as a matter of right in an age discrimination action, is in no way implicated by the decision of the Eleventh Circuit in this case.

Petitioner's apparent assertion that the Eleventh Circuit departed from the accepted course of judicial proceedings so as to call for an exercise of supervisory intervention by this Court is patently without merit. Far from "excluding" evidence as Petitioner claims, the Eleventh Circuit panel carefully considered Petitioner's arguments and the various theories available to him for establishing a prima facie case of age discrimination, ultimately concluding that the evidence of record failed to create any inference of age discrimination or to make out a prima facie case. The Petition does no more than express dissatisfaction with the fact that both the District Court and the Court of Appeals, having reviewed a complete factual record developed upon full discovery, having given due and deliberate consideration to all of Petitioner's arguments, and having applied proper legal standards, disagreed with Petitioner's contentions as to the "evidence" and ruled against him. Summary judgments are frequently granted in favor of defendants in age and other employment discrimination actions. The fact that Petitioner here has joined the list of other unsuccessful plaintiffs in this regard affords no basis for the granting of certiorari in this case. Petitioner seeks only to have this Court engage in the same review of the quantum and quality of the evidence which has gone before, and Respondent respectfully submits that no useful or valid purpose would be served by such an exercise.

II. The Petition For Writ Of Certiorari Is Untimely.

The Eleventh Circuit opinion was issued on April 4, 1983. Petitioner then moved for rehearing by the original panel, and the petition for rehearing was denied in an Order entered by the Eleventh Circuit on June 2, 1983. (Petition, Appendix B-35)

The Petition for Writ of Certiorari in this case was received by and filed with the Clerk of this Court as of

September 2, 1983.[2] The ninety day deadline for filing a Petition for Writ of Certiorari in this case, measured from the date of denial of the petition for rehearing in the Eleventh Circuit, expired on Wednesday, August 31, 1983. 28 U.S.C. § 2101(c); Sup. Ct. R. 20.4. Because the petition was not received by and filed with the Clerk of this Court until September 2, 1983, it was therefore not filed within the time prescribed by law and should be rejected. Sup. Ct. R. 20.2, 28.2.

CONCLUSION

For the foregoing reasons, Respondent Southern Railway Company respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

/s/ D. Robert Cumming, Jr.

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Dated: November 21, 1983

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[2] The Petition as originally submitted was received by the Clerk on September 2, 1983, but was returned to Petitioner for the correction of certain deficiencies under the Rules of this Court. The Petition was subsequently re-submitted and was deemed to have been filed and docketed as of September 2, 1983. No certificate of mailing under Sup. Ct. R. 28.2 accompanied either the original or the re-submitted Petition.